

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**FILED  
CLERK**

7/26/2019 8:40 am

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UNITED STATES OF AMERICA, :  
 :  
 : 13-CR-00607 (JFB) (AYS)  
 v. :  
 : July 2, 2019  
 PHILLIP S. KENNER, et al., : Central Islip, New York  
 :  
 Defendants. :  
 :  
-----X

**U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE**

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Appearances continued on next  
page.)

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1 (Proceedings began at 1:16 p.m.)

2 THE CLERK: Calling criminal case 13-CR-607, United  
3 States of America v. Phillip Kenner and Thomas Constantine.

4 Counsel, please state your appearance for the  
5 record.

6 THE COURT: Good afternoon, Your Honor. Saritha  
7 Komatireddy for the United States. I'm joined by AUSA Matt  
8 Hagans, AUSA Madeline O'Connor, and AUSA Diane Leonardo as  
9 well as our case agents, Special Agent Matt Galioto and  
10 Special Agent Joshua Wayne.

11 THE COURT: Okay. Good afternoon.

12 MR. HAGANS: Good afternoon, Your Honor.

13 MR. TALKIN: Good afternoon, Your Honor. Sam Talkin  
14 for Tommy Constantine who's seated to my right.

15 THE COURT: Yes, Good afternoon, Mr. Talkin and Mr.  
16 Constantine is present. Good afternoon, Mr. Constantine.

17 DEFENDANT CONSTANTINE: Good afternoon, Your Honor.

18 DEFENDANT KENNER: And good afternoon, Your Honor.  
19 Phil Kenner, pro se defense.

20 THE COURT: Okay. Good afternoon, Mr. Kenner. As  
21 you know, I scheduled this as a status conference. There are  
22 a number of outstanding issues that I have on my agenda to  
23 discuss and then I'll obviously address any other open issues  
24 that anyone wants to raise. Mr. Kenner has made a number of  
25 filings since the last conference, so I wanted to go through

1 them.

2 But the first issues that I want to consider is the  
3 forfeiture issue. The Court has received obviously a number  
4 of letters since our last conference. I did try to have the  
5 parties utilizes the services first of Judge Brown who then  
6 had to recuse himself and then Judge Shields to try to address  
7 the concerns that the Court had with respect to the scope of  
8 the forfeiture. And I read the transcript of Judge Shields'  
9 proceeding. I received the Government's proposed order and  
10 then obviously the letters from the bank and the DCSL parties  
11 including the letters from yesterday indicating their desire  
12 to be heard today with respect to this issue.

13 But before I potentially hear from them, I do want  
14 to just discuss my own views of what I've read. And maybe I  
15 wasn't as clear as I should have been when I sent it out to  
16 the magistrate judge to try to see if the parties could work  
17 it out. I am concerned about the scope of the forfeiture in  
18 this case. My view based upon the numerous submissions that  
19 I've had before me is that forfeiting an entire resort in  
20 Mexico including one that has intricacies such as time shares,  
21 thousands of people who've purchased time shares that to  
22 utilize what the Government has suggested to this Court which  
23 I understand obviously is the normal process of preliminary  
24 order of forfeiture followed by an ancillary proceedings where  
25 innocent third parties can, you know, raise their claims that

1 in this particular case under the unique facts of forfeiting a  
2 Mexican resort with these types of investments could have the  
3 practical effect of destroying the value of that resort,  
4 hurting innocent third parties who had nothing to do with this  
5 case, and potentially hurting the victims in this case who  
6 continue to have investments in that property and would  
7 obviously be impacted by a decision -- if a Court's decision  
8 to preliminary -- enter a preliminary order of forfeiture were  
9 to have the adverse economic impact that I am persuaded based  
10 upon what I've read that it would have that it makes no sense  
11 for the Court to do that.

12 I have seen nothing in the Government's letters,  
13 nothing to persuade me that these issues that are being raised  
14 are not valid issues. The Government has not written a letter  
15 to the Court that they're wrong, this couldn't possibly happen  
16 or they're -- you know, just because there hasn't been any  
17 adverse consequence in terms of being unable to sell  
18 timeshares at this point, even though obviously the specter of  
19 forfeiture has been in existence for years, does not mean that  
20 once the Court enters if the Court were to enter an order of  
21 forfeiture for the entire property and then require every  
22 person who's purchased a timeshare -- would have to show the  
23 Government the value of that, would have to get approval from  
24 the Government, whatever process the Government thinks that  
25 they would put in place to evaluate those claims to me is not

1 something that is going to be an insignificant thing where  
2 people are going to continue to be able to transact business  
3 with respect to these timeshares without any concerns.

4 I just think defies logic, and that's just one  
5 issue. I'm just pointing it out to be one issue. I just  
6 think there are multiple issues about forfeiting this entire  
7 resort that I don't have answers to. So I don't know if the  
8 Government wants to respond now and explain to me what I'm  
9 missing and why I should not be concerned about all these  
10 things or why the Government is not concerned about all these  
11 things. But this has been an ongoing concern of the Court for  
12 many months now. So unless the Government explains to me why  
13 they're still insisting on forfeiting the entire resort,  
14 including having people who have timeshares go through some  
15 process with the Government to try to be able to move forward  
16 with respect to their property, I have to reevaluate the whole  
17 situation and determine what discretion I have to depart from  
18 the usual practice and come up with my own solution to this  
19 situation because the Government is not proposing anything to  
20 the Court.

21 So I don't know if the Government wants to address  
22 that.

23 MS. LEONARDO: Yes, Your Honor; we would. Your  
24 Honor, we have discussed with Danske Bank also an  
25 interlocutory sale, which as Your Honor is correct, trying to

1 undertake selling the property in Mexico would be a huge task.  
2 We had meetings with Danske Bank and DCSL back in I think it  
3 was March with regard to an interlocutory sale. To that end,  
4 the Government hired a consultant who had worked with our  
5 office previously with regard to a large-scale sale of Hotel  
6 [indiscernible].

7           The consultant had indicated to us that the first  
8 thing he would need to look at would be the trust agreement  
9 because the resort is actually held in a Mexican trust.  
10 Danske Bank had indicated to us back in March that they would  
11 provide that to us. They have not provided that to us yet.  
12 That would be the first step to see the feasibility of that.  
13 The consultant I don't believe met with Danske Bank's  
14 approval. We're not suggesting that we're limited to one  
15 consultant or we wouldn't work with a consultant that the bank  
16 has.

17           I know some of the submissions from Danske Bank  
18 involved suggestions that an appraisal is done. Of course,  
19 yes, an appraisal needs to be done. I don't know if Your  
20 Honor recalls back in, oh gosh, the beginning of 2017, DCSL  
21 and Danke had approached the Government about selling a  
22 portion of the property. We had a very limited appraisal  
23 done. I don't believe Your Honor would allow the marshals at  
24 that point to go to the resort to actually do a full-blown  
25 appraisal. We had hired Cushman and Wakefield to do the

1 appraisal. As I said, it's a very limited appraisal with  
2 regard to about 12 acres of property.

3           So, we are not looking at this with blinders on in  
4 terms of just thinking we can do this. We have attempted to  
5 work with the bank. I believe we can still work with the  
6 bank. I think everyone's interest is to try to an  
7 interlocutory sale. That does not have to be put into a  
8 preliminary order of forfeiture, though, and I think that's  
9 where we kind of --

10           THE COURT: I know, but what happens if I enter a  
11 preliminary order of forfeiture of the entire property and  
12 then for months, you're in negotiations over pursuing this  
13 interlocutory sale? What's going to happen to the property?  
14 What's going to happen to the value of the property? What's  
15 going to happen to the people who own the timeshares? If --  
16 this is not something that's addressed in the preliminary  
17 order. I don't understand why these concerns that everyone is  
18 raising are going to just -- everything's going to be frozen  
19 while the Government tries to pursue an interlocutory sale.

20           MS. LEONARDO: Your Honor, our suggestion in the  
21 preliminary order at Paragraph 3 was that the status quo would  
22 remain, that it would remain under the --

23           THE COURT: But what does that mean the status quo  
24 -- they're point in the status quo is that nobody's going to  
25 want to buy these time -- nobody's going to be able to



1 transact on these timeshares.

2 MS. LEONARDO: That would --

3 THE COURT: That's not the status quo.

4 MS. LEONARDO: I'm sorry, Your Honor. That would  
5 remain under the protective order that's been in effect since  
6 2015. We're not looking to forfeit interests of obviously  
7 innocent third parties.

8 THE COURT: So why are you even involving the third  
9 parties? Isn't there a way of forfeiting the interest that  
10 the Government is focused on in the properties without even  
11 having the third parties go through this whole process? These  
12 third parties obviously had nothing to do -- their money is  
13 not involved in this case. Why would you make them go through  
14 this whole process of submitting documentation to the  
15 Government when -- unless I'm missing something, it's clear  
16 that they have nothing to do with this case, right?

17 MS. LEONARDO: Well, Your Honor, at this point, we  
18 don't know if the documentation is. So, for example, if the  
19 resort wanted to give us the documentation that they have, I  
20 assume they have records of who the third parties are, I mean  
21 that's something we could explore also without having to  
22 involve people. Or the Government has a contract with an  
23 asset recovery firm that does this type of thing.

24 THE COURT: But under what theory is the Government  
25 even seeking to forfeit the property including the interest of

1 the time shares? Under what -- why? Why would you be doing  
2 that other than to potentially I guess you can't do an  
3 interlocutory sale unless the whole -- everything is  
4 forfeited. Is that essentially the reason?

5 MS. LEONARDO: No, Your Honor. I think we can do an  
6 interlocutory sale like with the bank. We can come to terms  
7 on how it had to do an interlocutory sale. I mean I think at  
8 this juncture, it's really very premature in part because we  
9 haven't gotten that far because we don't have a preliminary  
10 order of forfeiture. We have tried to talk to the bank.  
11 We've not agreed --

12 THE COURT: Okay. What's going to happen if you're  
13 wrong? What's going to happen if you're wrong and I enter the  
14 order that you're requesting tomorrow, okay, and then all  
15 these things start happening with respect to the resort that  
16 are negative consequences for everybody? What's going to  
17 happen? What's the Government going to do with that money?  
18 You can't agree on it's an interlocutory sale. An appraisal  
19 is going to take six months, a sale is going to take another  
20 six months. You know, who knows how long these things could  
21 take. And in the interim, nobody's able to dispose of their  
22 timeshares because of the uncertainty surrounding the resort.  
23 What's the Government going to do?

24 MS. LEONARDO: Your Honor, I think one of the -- I  
25 don't think this was on PACER, but I think one of the prior --

1           THE COURT: Who is going to buy a timeshare in a  
2 situation that you're describing? Who is going to buy a  
3 timeshare if there's a preliminary order of forfeiture for the  
4 entire resort and the Government is pursuing a sale of the  
5 property and is going to require people to submit all kinds of  
6 documentation in the interim in order to engage in any  
7 transactions with respect to the property? Who is going to  
8 decide this is a good time for me to purchase a timeshare in  
9 that property?

10           MS. LEONARDO: Your Honor, that's been in the  
11 protective order for the past four years that the property is  
12 subject to forfeiture. That's been in existence for four  
13 years. It's on the internet. It can be pulled up if you look  
14 up Diamonte San Lucas. You know, there's also been a lot of  
15 movement in the resort. There's been a Hard Rock Hotel that  
16 has been built there and is now open. There's a Nobu Hotel.  
17 There's a Tiger Woods golf course. There's a Davis Love golf  
18 course. We're not --

19           THE COURT: When was the last time the Government  
20 obtained a forfeiture order of a business of this complexity  
21 in the United States or outside the United States? When was  
22 the last time that has happened?

23           MS. LEONARDO: Complexity-wise, I would --

24           THE COURT: Complexity-wise You have a resort --

25           MS. LEONARDO: -- probably --

1 THE COURT: -- an entire resort with banks, with  
2 timeshares, and putting in -- well, let's put aside the fact  
3 that it's in Mexico. What would you equate -- what would you  
4 point me to as an example where a court did what you're  
5 suggesting and that it ran very smoothly?

6 MS. LEONARDO: Probably Madoff, Your Honor, was huge  
7 in terms of what was seized and there were -- there was  
8 litigation. I think there's still litigation going on with  
9 regard to Madoff.

10 THE COURT: Yeah, but weren't those -- those were --  
11 that was money in bank accounts, though, right? We're not  
12 talking about a resort, there was a resort or something  
13 that --

14 MS. LEONARDO: I don't think there were resorts,  
15 Your Honor, but there were numerous properties. I mean I was  
16 involved in a forfeiture here where we seized an oil company,  
17 Mystic Oil, and we sold the company and we lost a deal with,  
18 oh gosh, Hess Gas had parts of it. There were --

19 THE COURT: Okay. When's the last time it involved  
20 an overseas entity?

21 MS. LEONARDO: Your Honor, I can't think of anything  
22 from this jurisdiction with an overseas entity, but it's not -  
23 -

24 THE COURT: I think the Government's completely  
25 underestimating -- completely underestimating the complexity

1 of this particular forfeiture and the potential of innocent  
2 third parties being hurt by this Court doing what you're  
3 requesting me to do. I could be wrong. Maybe I'm completely  
4 misreading --

5 MS. LEONARDO: Your Honor?

6 THE COURT: -- the situation, but every instinct  
7 that I have tells me that this is not a situation where that  
8 just entering a preliminary order of forfeiture for the entire  
9 property is not going to have any adverse consequences.  
10 That's what my instincts are telling me.

11 MS. LEONARDO: Your Honor, we have spoke with the  
12 bank before. We have talked to them. We have -- as like I  
13 said, back in March, we came up with the idea of an  
14 interlocutory sale which would probably be the best way to do  
15 this. You know, we are in a very preliminary stage of it. As  
16 I indicated, we've hired a consultant. If the bank wants to  
17 hire a consultant, we're not certainly limited to one  
18 consultant. I imagine there are going to be at least one or  
19 two appraisals. Obviously, the Government would do one and  
20 the bank would do one.

21 THE COURT: I know, but I also -- I want to move  
22 forward with the sentencing, obviously, so this process of an  
23 interlocutory sale could take, you know, I don't know. How  
24 long could it take, months, years? I don't know what period  
25 of time you're even talking about, so --

1 MS. LEONARDO: Well, Your Honor, the preliminary  
2 order is final as to the defendant at sentencing. It's not  
3 final as to any third party until the ancillary process is  
4 done. So the sentencing doesn't have to wait until the  
5 interlocutory sale.

6 THE COURT: I understand that, but if my whole  
7 concern is about the adverse consequences, what I'm telling  
8 you is if I were to move forward with respect to the  
9 defendants and their forfeiture, this open-ended interlocutory  
10 sale issue could go on for a very long time and I'm not sure  
11 what's going to happen to the value of the property and to the  
12 innocent third parties in the interim. That's the --

13 MS. LEONARDO: Your Honor, we also have within DOJ,  
14 we also have -- the marshals have an international asset  
15 forfeiture division as does DOJ. We've spoken with both those  
16 entities and as opposed to this office, myself not having  
17 international forfeiture experience, they do. They have  
18 contacts in Mexico. There is a U.S. marshal who's  
19 specifically assigned to Mexico and also one of the DOJ  
20 attorneys. So we have discussed it with them. You know, it's  
21 not our intention to have it go on for years, but as I said,  
22 that doesn't have to be for the defendant to be sentenced. We  
23 can try to, you know, assuming the bank wants to sit down with  
24 us and be cooperative, then we can try to make this go as  
25 quick as possible.

1 But as I mentioned earlier, we had asked the bank  
2 for the trust agreement back in March and we don't have that  
3 yet. And that was the first thing our consultant asked for  
4 just to start looking at how to accomplish this.

5 THE COURT: All right. Let me hear from -- is the  
6 bank's lawyer here?

7 MR. KOSTOLAMPROS: Thank you, Your Honor. George  
8 Kostolampros of Venable representing Danske Bank.

9 THE COURT: Yes.

10 MR. KOSTOLAMPROS: Thank you for recognizing our  
11 concerns. And I'd like to add a couple of other things.  
12 You've addressed one of the main concerns that we raised with  
13 the Government after our initial discussions about an  
14 interlocutory sale which is, number one, timing. From our  
15 consultant who has worked on the property for a number of  
16 years, they've told us it would take at least a year for a  
17 sale to occur. And the issue is what happens in the meantime.  
18 There's going to be concerns about what gets sold, what can be  
19 sold, liquidity issues. So that's number one.

20 The other issues that have come up in our initial  
21 discussions were what is being sold ultimately. The  
22 Government's unwilling to recognize any third party sale that  
23 has already occurred, so what possibly can be out there to  
24 sell when there are going to be competing interests of that  
25 particular property. And the Government has this notion that,

1 look, let's just agree to an interlocutory sale and we'll  
2 figure this all out later. Well, the repercussions are going  
3 to be happen within that year. There's not going to be enough  
4 value for anyone, frankly.

5           And ultimately, our suggestion was, number one, get  
6 an appraisal so you can think to even show that there's any  
7 value here that would go towards any victims here. Our  
8 appraisals show that there isn't even enough value here to pay  
9 the bank back, and we've raised all these issues and  
10 ultimately, what we get back is the same answer which is  
11 ultimately we'll figure it out as we go and that's just not  
12 going to work for us. And ultimately, our client has decided,  
13 look, an interlocutory sale would not solve the problem.

14           THE COURT: I know, but you're not really proposing  
15 any alternatives then. What are you proposing as an  
16 alternative?

17           MR. KOSTOLAMPROS: We've raised it in our letter,  
18 our last letter, which is, number one, is if the Government  
19 believes there is equity value in this resort, ultimately then  
20 there's equity owners in the U.S. where the Government can get  
21 the shares of the particulate equity owners. And, therefore,  
22 you obviate the need for -- to bringing any sort of Mexican  
23 law issues.

24           THE COURT: I know, but to the extent that the  
25 monies obviously that originated from the victims in this case



1 have flowed through U.S. entities into foreign entities, I  
2 don't know why they would be bypassing that other money. I  
3 don't understand why that would be the line just to say we'll  
4 just focus on the U.S. entities.

5 MR. KOSTOLAMPROS: Well, the reason why is because  
6 if there is equity value in the underlying entities themselves  
7 that own the property, outside from they're a second  
8 beneficiary to the bank that has the -- is the first  
9 beneficiary of this trust. If there's equity value there, if  
10 you sale the equity shares, the U.S. equity interest, and if  
11 there is according to the Government's there's equity value  
12 there, then there will be equity -- there will be someone who  
13 will purchase that equity value assuming that there is a  
14 payday at some point and there's value in that equity.

15 And, again, I think if you do that and you start off  
16 with, number one, an appraisal to see what you can sell, like  
17 how much would it be worth, that equity value?

18 THE COURT: All right. Does the Government want to  
19 respond to that?

20 MS. LEONARDO: Your Honor, with regard to the way  
21 the entity is held, it's a little confusing I think on the  
22 LLCs and what the shares are. At one point, KAJ Holdings  
23 conveyed interest to -- one percent interest to other people.  
24 We don't know if there was any value to that or if there was  
25 any value given for that.

1           One thing I just want to point out, Your Honor,  
2   that, you know, with regard to this whole process if the  
3   resort wanted to cooperate, they could provide us records  
4   that, you know, we have sought -- we get some records. We get  
5   spreadsheets. We get some of the -- well, some monthly  
6   reports from the resort. But if they can provide us with  
7   records and a trust agreement, that would also expedite this  
8   process. I do agree that we do need to do an appraisal, but  
9   that would also mean the marshals would want to go and do the  
10   appraisal or be part of the appraisal and review books and  
11   records to get that done to get an accurate valuation of the  
12   resort.

13           THE COURT: All right. You want to -- their point  
14   is that the Court obviously has been considering this  
15   forfeiture issues for years and none of the things that you're  
16   pointing to in terms of the adverse consequences have  
17   happened, obviously other than just the issue regarding the  
18   loans. But do you want to address that more generally?

19           MR. KOSTOLAMPROS: Your Honor, we've addressed it  
20   before. The bank has forbearred on its amounts due to it,  
21   including -- right now it's owed \$32 million that it's  
22   forbearred on. It's sort of its only going concern because the  
23   bank has all of its loan. Without the bank there, frankly,  
24   the resort would not be a going concern at this point.

25           THE COURT: All right. Let me just see is the

1 lawyer for the DCSL properties want to --

2 MR. SOUTHER: Thank you, Your Honor. Thomas Souther  
3 of Freeh Sporkin & Sullivan for the DCSL parties. I won't  
4 belabor the point. You raised the point. But to address the  
5 last question that you just asked about, you know, the status  
6 of the project now, as the bank pointed out, I mean we  
7 currently owe the bank and it's past due \$32 million in  
8 principal payments.

9 At this point, the bank -- the project has only been  
10 able to maintain enough sales to be able to meet its operating  
11 expenses and pay its interest obligations. It's not been able  
12 to further advance the development because that's going to  
13 require sales of parcels and large parcels for further  
14 development, consistent with what as the Government pointed  
15 out was done in the past. Back in 2014, they were able to  
16 sell a large parcel to Hard Rock Nobu developers who have  
17 developed a hotel on that property. That has taken years. I  
18 mean this isn't a function of like flipping a switch and  
19 tomorrow everything will be fixed.

20 Just as an anecdotal illustration, there's a  
21 condominium development that was projected to start in this  
22 past January that we have not been able to finance. The bank  
23 -- you know, there's no financing available from the bank.  
24 There's no other financing sources available given the  
25 pendency of the forfeiture proceedings. If we don't get that

1 project going by October, we're going to be in a position  
2 where we're going to have to start repaying deposits to people  
3 who put down deposits on that in anticipating of having a  
4 condominium to move into.

5           So the notion that we maintain the status quo is  
6 really just we've been treading water and trying to bail the  
7 water out of the boat as we've been proceeding for the last  
8 several years. The day of reckoning is coming, and, you know,  
9 we have -- our credit lines are exhausted. And it puts the  
10 resort in a desperate situation.

11           Our proposal to the Court in terms of the forfeiture  
12 was forfeit the interest that the defendants have.

13           THE COURT: But I don't -- again, I don't think that  
14 adequately addresses it because the whole theory the  
15 Government has here is that the proceeds with respect to the  
16 fraud that occurred here have flowed through much beyond the  
17 defendants' interests now including to your client, Mr. Jowdy  
18 and his entities. So I don't know why that would be the  
19 dividing line would be their interests. If the money flowed  
20 through to your client and the entities that he formed, why  
21 shouldn't that -- that would be a standard thing that would be  
22 subject to forfeiture. Put aside that people who own  
23 timeshares who have nothing to do with this case, Mr. Jowdy  
24 and his entities clearly were direct beneficiaries of Mr.  
25 Kenner sending the money to them, right? I don't understand

1 why would I ever exclude Mr. Jowdy and his entities from  
2 forfeiture?

3 MR. SOUTHER: No, Your Honor, I mean I'm just  
4 proposing as an alternative --

5 THE COURT: I know, but --

6 MR. SOUTHER: -- because there was --

7 THE COURT: -- that's not a viable alternative to  
8 just forfeit the defendants' interests when, you know, Mr.  
9 Kenner has been pointing out for years and it's obvious from  
10 the trial that the money -- that money went to Mr. Jowdy and  
11 his entities. So why wouldn't that at a minimum also be  
12 subject to forfeiture?

13 MR. SOUTHER: Well, you know, Your Honor, and that's  
14 ultimately would be the Court's decision to make is whether  
15 that should be included. But the idea of forfeiting the  
16 entire resort, when you look at it and the amount of money of  
17 criminal proceeds that arguably are traceable to having gone  
18 into this compared to the hundreds of millions of dollars from  
19 the bank, from investors that are purchasers of property, from  
20 developers who develop the hotels along the waterfront,  
21 hundreds of millions of dollars that clearly are untainted.  
22 You know, our point is, you know, why does the Government have  
23 to reach for the entire resort.

24 There's got to be an alternative, and the  
25 alternative would be to reach for the equity interests which,

1 you know, we would suggest, unfortunately, right now there's  
2 no value to those equity interests, but the equity interests  
3 in the project itself which would not then trigger this  
4 avalanche of timeshare owners, real property owners, hotel  
5 developers to have to parade in here and demonstrate to the  
6 Government that they are bona fide purchasers. And it would  
7 also allow the project going forward to be able to sell real  
8 property, to be able to sell timeshares without that being  
9 encumbered by, you know, the additional obligation of, oh and  
10 by the way, we're just going to have to get the Government to  
11 approve.

12 I mean as the Court probably knows, there's dozens  
13 of developments down in Mexico and Cabo San Lucas. The  
14 competition down there is enormous, and all of it would take  
15 it, you know, an additional order such as this forfeiting the  
16 entire resort to add fuel to the fire down there that the  
17 competition would be able to sort of wave that to their  
18 potential purchasers.

19 THE COURT: Okay.

20 MR. SOUTHER: Thank you, Your Honor.

21 THE COURT: And does the Government have anything  
22 they want to add?

23 MS. O'CONNOR: Your Honor, we just wanted to point  
24 out in terms of the ownership interest and the equity  
25 interests owned by the LLCs, we've considered that option;

1 however, the ownership structure has it that the trust has the  
2 first place beneficiary being the bank and then the second  
3 place beneficiary being the LLC, Mexican LLC, and then  
4 underneath that the domestic LLCs. And the problem being if  
5 we only seek to forfeit the interest owned by the LLCs, the  
6 bank is no longer subject to the forfeiture, and the project  
7 itself as a whole could turn around and foreclose on the  
8 property and there would be nothing left. So that's a very  
9 real concern.

10 In terms of the timeshare interest, that seems to be  
11 the greatest concern of the Court and the resort. It may turn  
12 out that these interests are contractual interests rather than  
13 property interests that aren't even subject to forfeiture. It  
14 may be now --

15 THE COURT: But why wouldn't the Government just  
16 carve that all out as part of the initial order of forfeiture,  
17 this order of forfeiture will not impact the ability of  
18 timeshare owners to transact business with respect to their  
19 property? The Government doesn't care -- we're not going to  
20 get involved in the timeshares. We're going to let them  
21 proceed as if this property wasn't subject to forfeiture  
22 because it's not productive for the Government to start  
23 putting requirements on timeshare owners that could  
24 potentially damage the value of the entire property? I don't  
25 even know why the Government is even concerned about that.

1 MS. O'CONNOR: The Government has considered that,  
2 although we don't -- again, we're not sure what these  
3 contracts look like, how to even describe them in the  
4 forfeiture order to carve them out. If that's something the  
5 Court would like us to do, we can carve out the timeshare  
6 interest, although we do have concerns about some of these  
7 individual lot owners and the timeshare interests. The  
8 Government's aware that Jowdy, for example, has obtained a  
9 home, we believe, without any value given. So those are the  
10 kinds of interests that we would look to seek to forfeit.

11 THE COURT: I don't have any problem with those --  
12 you heard what I said. I understand the relationship that Mr.  
13 Jowdy and his entities to what happened here, so that's -- I'm  
14 not concerned about limiting his ability or, you know, of  
15 making sure whatever interest he has down there or has  
16 received is potentially subject to forfeiture. I don't have  
17 any issues with that, but that also doesn't mean in order to  
18 effectuate that -- I understand what you're saying about the  
19 bank and its ability then to foreclose and, you know, move  
20 ahead.

21 But there's got to be a solution in between where --  
22 and, you know, I'm a judge. I'm not a business person, so I  
23 don't know all the intricacies of something like this. So I'm  
24 relying upon the Government's assessment of the way to do this  
25 to protect what the Government is trying to accomplish here



1 without overreaching in a way that is going to hurt everybody.  
2 And I don't think we're at that point. If the Government just  
3 continues to not really focus on this, I'm going to have to  
4 try to figure out myself in terms of where I should draw the  
5 line. But I am not comfortable with what the Government is  
6 proposing now, which is just to forfeit all the property,  
7 we'll try to maybe pursue an interlocutory sale. If we can't  
8 do an interlocutory sale, we'll figure it out. I'm not  
9 comfortable with that.

10           So I'm suggesting to you without understanding all  
11 the intricacies -- I understand you may need more cooperation  
12 and more documentation to be in a place that you're  
13 comfortable with. What I want the Government to do is try to  
14 obviously focus its attention on the core of this case which  
15 is the entities that were controlled by the defendants and  
16 those entities that the money was moved into and protect all  
17 of that, make sure that that's protected in the context of a  
18 forfeiture but allow to the extent you can allow the ongoing  
19 business of the resort including the timeshares to be  
20 completely unaffected by what the Court is doing.

21           If there are little instances where the timeshare  
22 relates to Mr. Jowdy, obviously, the Government can deal with  
23 that. I'm talking about the thousands of people who have  
24 purchased timeshares, people a year from now who may want to  
25 sell their timeshares. There should be something in the order

1 once the Government gets efficient documentation to be  
2 concerned to eliminate any concerns to allow the ongoing  
3 development and business of the resort to continue regardless  
4 of whatever forfeiture order that the Court enters. That's --  
5 I don't know how much more guidance I can give you, but that's  
6 what my concern is.

7 MS. O'CONNOR: So the Government thinks that it  
8 would be most helpful then if the Court would order Jowdy and  
9 the resort then to produce the contracts and the trust  
10 agreement so that we can formulate a way to forfeit the  
11 property to the best of our abilities and preserve the value  
12 of the resort and perhaps carve out some of these interests  
13 that the Court is concerned about. But until we see these  
14 records and have a way to do that, we're in an impossible  
15 position as well.

16 THE COURT: Where's Mr. Souther?

17 MR. SOUTHER: Your Honor, the Government's never  
18 asked for any of the records. The records they've asked for  
19 are the financial records which we, as we've discussed in past  
20 appearances, we give them all the financial data that we give  
21 to the bank. You know, I'm not sure exactly what records that  
22 she's looking for, whether she's looking for the 6,700  
23 contracts that have been signed already with respect to the  
24 timeshares and the 170-plus sales of real property that have  
25 already been sold over the years.

1 I mean it's not clear to me, but they've never even  
2 asked for this information. So the idea that she's asking the  
3 Court to order something as though, you know, she hasn't been  
4 able to get it from us is a little frustrating, frankly.

5 THE COURT: All right. Well, let's not try to  
6 resolve it today.

7 MR. SOUTHER: Yeah.

8 THE COURT: But I'm going to ask that you sit down  
9 with the Government, make a request for whatever documentation  
10 the Government wants, and if you can't agree to provide it, I  
11 want you to come back right away to me and tell me what you --  
12 what they agree to provide and what they won't provide. But I  
13 want you and your clients to understand my view is that the  
14 Government in order to address the Court's concerns regarding  
15 the scope of the forfeiture, she get access to these  
16 materials. This is all part of trying to figure out --

17 MR. SOUTHER: Certainly.

18 THE COURT: -- where I should draw the line and how  
19 I should try to address these very complicated forfeiture  
20 issues that are before the Court. So before you come to me  
21 with every little document, you should understand that it's  
22 going to be my generally view of the situation, all right?

23 MR. SOUTHER: No, I understand, Your Honor.  
24 Absolutely.

25 THE COURT: All right. So I don't know, does the

1 Government want to report back to the Court two weeks, three  
2 weeks? I don't know what you think is a reasonable amount of  
3 time.

4 MS. O'CONNOR: Three weeks, Your Honor.

5 THE COURT: Three weeks, okay. So three weeks from  
6 today I'll get a letter from the Government indicating what  
7 documentation, if any, that Mr. Souther's clients will not  
8 provide. You know, you can just describe what your agreement  
9 is generally. I don't need to know every document, but just  
10 tell me what generally you agreed up on and if there's any  
11 area of disagreements, let me know and then we'll have a  
12 conference immediately, okay?

13 MR. SOUTHER: Thank you, Your Honor.

14 THE COURT: All right. Thank you.

15 MR. TALKIN: Your Honor, there's one issue I'd like  
16 to raise that I think you were starting to raise in your  
17 comments and that's about the timing. You know, our position  
18 -- and well, I shouldn't speak for Mr. Constantine -- is that,  
19 you know, our hope is that some of these victims will  
20 ultimately, especially out of the Jowdy share get some money  
21 back. And if that happens, that's powerful 3553(a)  
22 information for the Court to analyze when deciding what  
23 sentence to deliver upon Mr. Constantine.

24 And that's why there's a real timing issue as to us  
25 as well because if a victim of a crime gets paid back, I think

1 that the crime itself is viewed differently than a victim of a  
2 crime that doesn't get paid back. That's pretty fundamental  
3 to sentencing. And I think that -- I know that that is a  
4 concern of ours. So we although have no power and control  
5 over what's happening here, we just want to let the Court know  
6 our timing concern. If there is an opportunity for victims to  
7 get their money back and we're hoping there is, we would like  
8 that to happen before we're sentenced because obviously that's  
9 something the Court can consider in sentencing.

10 THE COURT: Well, I guess I don't agree with the  
11 fundamental idea that I should hold off sentencing until we  
12 see ultimately how much victims recover. I mean I just don't  
13 -- you know, obviously restitution is set in a lot of cases,  
14 and we don't put off sentences to see. But I understand your  
15 basic point, but I want you and your client to understand the  
16 whole -- I mean I went through the trial here. I understand  
17 that not every dollar was, you know, dissipated and spent on  
18 other things. I understand that a significant amount of the  
19 money went into Mexico.

20 So to the extent he's concerned that the Court will  
21 not consider that because we don't know how much is actually  
22 going to be recovered, I don't think that's fundamentally how  
23 I'm looking at the sentencing. I understand that issue and  
24 we'll do the best that we can. I'm going to go through with  
25 you now what I anticipate in terms of the sentencing. My goal

1 is to have the sentencings happen in September. We can't --  
2 you know, I've been a judge, you know, this is 13 years. I've  
3 never had a case where the sentencing has been delayed this  
4 long and there's been reasons for it. It's not like nothing  
5 has been happening. But there has to come an end, so we'll  
6 see where things stand with this by September. But we're not  
7 going to wait, for example, for an interlocutory sale or  
8 anything like that. That's not happening, okay?

9 MR. TALKIN: I understand that, Your Honor.

10 THE COURT: All right.

11 MR. TALKIN: I just wanted to raise that issue so  
12 you understand what we're thinking about.

13 THE COURT: Yeah. I would also ask in the  
14 discussions -- and obviously, the bank can participate in  
15 these as well -- it's Mr. Souther, but it does make sense that  
16 regardless of whether there can ever be an interlocutory sale,  
17 that this appraisal process should go forward I think because  
18 it would help everybody assess the whole situation. So I'm  
19 going to make that part of your discussion of making that move  
20 forward, you know, whatever the Government needs in order to  
21 be in a position to get an appraisal, that -- you know,  
22 everybody's encouraged the Government to take a look at how  
23 much the property's actually worth right now. And that also  
24 much be helpful to, you know, to the types of arguments that  
25 Mr. Talkin and Mr. Kenner might want to make with respect to

1 sentencing, right? If you know the value of the property, at  
2 least that would give you something to work with.

3 MR. TALKIN: Sure.

4 THE COURT: Okay.

5 MR. TALKIN: Absolutely.

6 THE COURT: All right.

7 DEFENDANT KENNER: And, Your Honor, if I could just  
8 clarify one point, you know, the Government back in 2015, 2016  
9 actually did their own accounting on the cash flow that  
10 they're now talking about and they provided the Court during  
11 the forfeiture hearings in early 2016 with both Government  
12 Forfeiture Document 36 and Government Forfeiture Document 44.  
13 Government 44 was the accounting records that Mr. Wayne had  
14 produced for the Government through Jowdy's attorneys  
15 confirming that a hundred percent of the money that flowed out  
16 of Hawaii as loans to Jowdy were in facts loans to Jowdy in  
17 spite of the Government's proffer during trial of being phony,  
18 bogus, and supposed.

19 Second and probably more important to this  
20 forfeiture issue, and the Government's trying to morph these  
21 two accounting records together when they are two unique  
22 issues. And I addressed that on my last representations to  
23 the Court. I think it was in Docket 667. But Forfeiture 36  
24 was the Government's accounting to track the funds that went  
25 to the purchase of the Cabo San Lucas property. My two

1 partners -- and for the record, zero of the dollars flow  
2 through any of my personal accounts.

3 My entity that the Government seeks to forfeit, Baja  
4 Ventures 2006, was paid for in its entirety by my two  
5 partners, Joseph Stumpel [Ph.] and [indiscernible], neither of  
6 which were ever named in the superseding indictment. The  
7 Government through Forfeiture 36 traced \$4.1 million to Mr.  
8 Jowdy for the purchase, although he only docketed 2.5 million,  
9 pilfering the other 1.6 that resulted in Mexican litigation as  
10 I've written to the Court.

11 The other investors, which include Mr. Peka [Ph.]  
12 who you've seen here and about nine other investors, totaled  
13 2.3 million. So in context, \$6.4 million was directly sent to  
14 Mr. Jowdy by my investors that are in the two equity LLCs.  
15 Mr. Jowdy through his legal counsel only represented that  
16 \$6.25 million was given to the seller, so he's \$150,000 short  
17 on what we gave him for our two equity positions,  
18 notwithstanding his accounting errors again in his favor.

19 THE COURT: All right. I don't want to go through  
20 all the details. I understand what you're saying, Mr. Kenner,  
21 but the purpose today is really just to give general guidance  
22 on what I'm trying to formulate with respect to the -- to  
23 these individual issues. Obviously, I have the briefing. I'm  
24 looking at them, but I don't want to get into all the details  
25 of that.



1           DEFENDANT KENNER:   Okay.

2           THE COURT:   Okay?

3           DEFENDANT KENNER:   I just want to make sure the  
4 Court was aware that they're morphing the Jowdy loan which was  
5 a separate issue from the actual equity investments. And the  
6 Government's own accounting does that. I didn't --

7           THE COURT:   Okay.

8           DEFENDANT KENNER:   -- I didn't provide that --

9           THE COURT:   All right.

10          DEFENDANT KENNER:   -- for the Court. They did it  
11 themselves, but now they want to ignore it and morph the two  
12 issues together.

13          THE COURT:   All right. Okay. With respect to the  
14 sentencing, obviously, we have the updated addendum for Mr.  
15 Constantine. I just want to make clear I think I've said this  
16 before, but it is the Court's view and it's consistent with  
17 the Government's letter to the Court, you know, two years ago  
18 that we're not -- that the Government is not seeking to hold  
19 the defendants accountable for any uncharged frauds. The  
20 scope of sentencing relates only to the frauds that were  
21 proved at trial, and so I don't see any need for any type of  
22 Fatico hearing. Nobody has persuaded me based upon any of the  
23 submissions that I should reopen the record with respect to  
24 the frauds that were proven at trial for purposes of the  
25 sentencing. Both sides had a fair opportunity to litigate

1 that, and so I don't envision there'd be any Fatico hearings.

2 Obviously, I know the Constantine motion for a new  
3 trial or for judgment of acquittal is still pending and I'm  
4 going to plan on issuing an opinion obviously prior to the  
5 sentencing on that. But what I want to do is to -- to the  
6 extent, you know, all the objections to the guidelines  
7 calculations are in, I have those, I'll address them. But to  
8 the extent that the defendants and then if the Government  
9 wants to respond and wants to put them in more general  
10 sentencing submission, we should set a date for you to do  
11 that, okay. So, again, I'm trying to have the sentencing in  
12 September, so you tell me what's a reasonable time for you to  
13 put that in?

14 MR. TALKIN: Late August.

15 THE COURT: Okay. This is for you as well, Mr.  
16 Kenner.

17 DEFENDANT KENNER: Yes, Your Honor.

18 THE COURT: August 26th. So this would include, Mr.  
19 Kenner -- and I know you requested for me to give you another  
20 standby counsel and I'll talk to you about that in a minute.  
21 I don't -- if you want someone just to help you, I assume it's  
22 just to try to help you formulate these types of things for  
23 sentencing. I just want to make sure just so you can  
24 understand what you may or may not need standby counsel for.

25

1           And I want to make clear this is not going to affect  
2 the deadlines. I'll find an attorney that can help explain  
3 certain things to you regarding the procedure, but we're not  
4 going to have an attorney who's going to need six months, you  
5 know, to get familiar with the record. That's not in your  
6 interest. That's not in anybody's interest.

7           DEFENDANT KENNER: I'm in concurrence with that.

8           THE COURT: All right.

9           DEFENDANT KENNER: The only person we're still  
10 waiting on is the forensic accountant who has failed to come  
11 see me through multiple, multiple promises.

12           THE COURT: Yeah, I did see that. But I'll ask Mr.  
13 Talkin about that in a minute, but to the extent you're making  
14 any additional requests other than I saw in your list of open  
15 items, there was the document that I think the Government said  
16 they would provide as long as you entered a protective order.  
17 And we discussed that so long ago, I didn't even realize it  
18 was still an open issue. But this was the appraisal, right?

19           DEFENDANT KENNER: Yes, sir.

20           THE COURT: What --

21           MS. LEONARDO: Your Honor, I have the  
22 confidentiality agreement with me and the appraisal if you'd  
23 like to sign it now.

24           THE COURT: Okay. All right. So you can get that,  
25 but other than that, Mr. Kenner, to the extent you're sending

1 me these request for admissions to any type of discovery  
2 demands that you're requesting at this point are denied.  
3 We're not -- as I just said, we're not -- there's going to be  
4 no Fatico hearing. I'm not reopening the forfeiture  
5 proceeding for what you're calling new evidence. I don't  
6 believe there's any basis for doing that at this point.

7           So the only thing you're -- and I'm going to have  
8 the Government respond to your motion for return of property  
9 and your motion for reconsideration on the Rule 29 and 33  
10 motion. I'll have them put in a response to that. But other  
11 than them responding to that, the only additional thing you're  
12 going to be submitting to the Court is your -- you know, your  
13 sentencing submission, any letters from family or friends,  
14 that type of thing. That's where we're up to in this  
15 proceeding.

16           And then the one last thing I wanted to talk about  
17 was restitution, but -- so that submission, Mr. Kenner, is  
18 August 26th. Cant he Government respond by mid-September?

19                           [Pause in proceedings.]

20           MR. HAGANS: I'm just looking at the calendar, Your  
21 Honor.

22                           [Pause in proceedings.]

23           MS. KOMATIREDDY: September 9th, Your Honor, should  
24 be two weeks.

25           THE COURT: Sure, September 9th. And then I'll just

1 pull up the -- I think the week of the 23rd, September 23rd.

2 [Pause in proceedings.]

3 THE COURT: September 25th for sentencing. I don't  
4 know if the Jewish holidays -- are the Jewish holidays -- I  
5 think they're later than that. I think it's, right, the 30th  
6 and the 1st?

7 MR. TALKIN: If it's a problem, we'll deal with it.

8 THE COURT: Okay. All right. So we'll say 11:00  
9 a.m. September 25th for sentencing. So, Mr. Kenner, in terms  
10 of what I've described, do you still want standby counsel to  
11 try to assist you in this additional submission that you're  
12 going to be making? Is that what you're requesting?

13 DEFENDANT KENNER: Yes. If someone would just come  
14 to visit me once at MDC.

15 THE COURT: Okay.

16 MR. TALKIN: And, Your Honor, as far as the  
17 accountant, I didn't know that there's been an issue recently.  
18 I will --

19 THE COURT: Yeah.

20 MR. TALKIN: -- do the steps. The only thing I ran  
21 into is when it was a joint -- it was a co-counsel issue, I  
22 could attest to get the -- I have to do an attestation to get  
23 the non-attorney into the jail. Since I'm not -- it's not for  
24 me under these particular circumstances, it's a little more  
25 difficult. If --

1 THE COURT: Okay. If you need an order from the  
2 Court --

3 MR. TALKIN: That's what I was going to say.

4 THE COURT: Yeah.

5 MR. TALKIN: If it's okay, I'll contact -- MDC  
6 Legal's been great with this, so I'll contact them. And it  
7 may take a court order, but I'll take the time to make that  
8 happen as soon as possible.

9 THE COURT: All right. And so let me ask the  
10 Government, Mr. Kenner did put in this return of property  
11 motion. I don't know if the Government saw that.

12 MR. HAGANS: We did, Your Honor.

13 THE COURT: Do you want to just respond to that in  
14 writing as well?

15 MR. HAGANS: I'd be happy to respond in writing.  
16 There's one specific allegation I'd like to put on the record.

17 THE COURT: Okay.

18 MR. HAGANS: Mr. Kenner, I believe it's an associate  
19 of his, filed an affidavit --

20 THE COURT: Yes.

21 MR. HAGANS: -- requesting return of some cash.

22 THE COURT: Money, yes. Twenty-five thousand  
23 dollars, right?

24 MR. HAGANS: Yes. The Government obviously disputes  
25 the circumstances set forth in that affidavit. The Government

1 was executing a valid search warrant and executed it validly.  
2 However, the Government did seize cash. It wasn't \$25,000.  
3 It was \$15,000, 150-\$100 bills. That seizure was disclosed to  
4 Mr. Kenner via his counsel on March 24th, 2014. I'd refer Mr.  
5 Kenner to Docket 48 which had the return on the search warrant  
6 which identified that seizure and identified the location from  
7 which those funds were seized.

8           The Government is puzzled that it took six years for  
9 this issue to be raised by Mr. Kenner's associate, puzzled  
10 that it took a year for the affidavit to be filed, puzzled  
11 that it's taken five years since the disclosure of that  
12 seizure. But if Mr. Kenner's disclaiming all claim to those  
13 funds and if the associate is willing to complete any  
14 necessary administrative paperwork that the FBI may require to  
15 return those funds, the Government has no objection per se to  
16 the return of that property.

17           THE COURT: Okay.

18           DEFENDANT KENNER: I think I understand what they  
19 were saying, Your Honor.

20           THE COURT: All right, that you need to disclaim any  
21 interest and then I understand there's a dispute about the  
22 amount.

23           DEFENDANT KENNER: I believe I did disclaim that in  
24 the last paragraph of my affidavit on my 41(g) motion, Your  
25 Honor.

1           THE COURT: All right. Did the Government see that?  
2 I didn't look at that particular issue, but if you think  
3 something else is required beyond that?

4           MR. HAGANS: I think with that and with his  
5 statement now on the record --

6           THE COURT: Okay.

7           MR. HAGANS: -- should suffice, Your Honor.

8           THE COURT: All right.

9           MR. HAGANS: And with respect to the other items,  
10 we'll be happy to respond in writing.

11          THE COURT: All right. Do you want to make that  
12 maybe September 13th?

13          MR. HAGANS: I'm sorry; just a moment, Your Honor.

14          THE COURT: Or you want to do it sooner? It's up to  
15 you.

16          MR. HAGANS: I don't think we need that much time,  
17 Your Honor.

18          THE COURT: How long do you need?

19          MR. HAGANS: Three weeks, Your Honor.

20          THE COURT: Okay. July 23rd. And then I also want  
21 you to put in -- I know obviously the motion for  
22 reconsideration rehashes a lot of the things that the  
23 Government has already briefed, but -- and you can  
24 reincorporate things you've already briefed, but I do want you  
25 to put something in writing on that as well. So do you want



1 to suggest a date for that?

2 MS. KOMATIREDDY: The same is fine, Your Honor.

3 THE COURT: Okay. All right. Mr. Kenner, I'll give  
4 you -- you can have -- how long do you need to put in a reply  
5 if you wanted any of those things, either of those things?

6 DEFENDANT KENNER: I'll put a reply in as soon as I  
7 get the paperwork from the Government.

8 THE COURT: They're going to get it to you July  
9 23rd, so two weeks, three weeks?

10 DEFENDANT KENNER: Three weeks would be fine just to  
11 make sure that it gets to me --

12 THE COURT: All right.

13 DEFENDANT KENNER: -- gets delivered to me.

14 THE COURT: So your reply on either of those motions  
15 is August 13th. And I won't have argument on those unless I  
16 think it's necessary.

17 MR. TALKIN: Your Honor, as to that motion, to the  
18 extent that we're going to join in and I don't know yet, I'm  
19 still working my way through those motions, we'll follow the  
20 same schedule.

21 THE COURT: All right.

22 MR. TALKIN: We'll let it be known before the 23rd  
23 if there's any additional filing we have. We'll file it in  
24 that three-week period.

25 THE COURT: All right. And, Mr. Kenner, did -- we

1 docketed his motion but he submitted two disks with exhibits.

2 DEFENDANT KENNER: Yes, sir; Your Honor.

3 THE COURT: So --

4 MR. TALKIN: I'll work out getting them.

5 THE COURT: Yeah. And we'll make copies and get it  
6 to the Government, okay?

7 MS. KOMATIREDDY: Yes, Your Honor. That would be  
8 great. I'll coordinate with your chambers, Your Honor.

9 THE COURT: All right. Then the only other issue I  
10 had is I was thinking about the restitution issue and I have a  
11 concern. It somewhat overlaps with the forfeiture issue as  
12 how the Court would figure out how to set restitution in this  
13 case. I don't know if the Government's given thought to that.  
14 In other words, you'd have to know the value of the resort,  
15 you would have to know what the value of the interests are.  
16 How would the Government -- how would the Court figure out  
17 what restitution the amount should be given obviously that not  
18 all the money is lost and is --

19 MS. KOMATIREDDY: I'm sorry, Your Honor.

20 THE COURT: -- at least in part invested.

21 [Pause in proceedings.]

22 MS. KOMATIREDDY: Yes, Your Honor. So with respect  
23 to the restitution, first of all, just as a first principle,  
24 the restitution only applies to the counts of conviction, the  
25 offenses for the counts of conviction. So we would focus on

1 the loss related to the three frauds proved at trial and then  
2 from there, we have loss affidavits from the victims  
3 explaining their specific losses.

4 THE COURT: I know, but -- look, I understand that,  
5 but like the Hawaii loss, the money -- at least part of the  
6 money obviously went to Mexico. So to figure out what the  
7 loss is, I would have to determine how much money is left in  
8 Mexico, what its worth is. I don't know given all these  
9 issues we're talking about with respect to the forfeiture, I  
10 don't know how I could do that, right, or am I missing  
11 something? How am I going to figure out how much of the money  
12 that was from the Hawaii fraud that's now in Mexico what it  
13 is, what's that amount?

14 MS. KOMATIREDDY: I understand your question, Your  
15 Honor. But I think it proceeds in two steps. First, we are  
16 looking at just the present loss absent Mexico. Mexico is if  
17 forfeited and if it yields value is just a way to satisfy the  
18 restitution. The Court doesn't need to anticipate in advance  
19 how much the victims will be compensated by proceeds from  
20 Mexico in order to back-calculate restitution. With the  
21 restitution order, the proceeds from Mexico will be used to  
22 satisfy the restitution order.

23 So all the Court has to do at sentencing and it also  
24 has time after sentencing to do this under the statute is an  
25 additional 60 or 90 days is just explain how much -- an

1 interim order indicating how much each victim is entitled from  
2 any prospective forfeiture monies that come in.

3 THE COURT: Well, you said a lot of different things  
4 that I don't quite understand. Maybe I missed it. First of  
5 all, if you're suggesting to me I just set the order of  
6 restitution at what the victims gave to -- you know, their  
7 affidavit of loss is going to say I gave X amount to Mr.  
8 Kenner or Mr. Constantine, and I haven't gotten it back. If  
9 you're suggesting that that's the amount of the restitution, I  
10 just disagree. I don't think to the extent that they have  
11 ongoing, you know, interests, I'm not sure that you just  
12 ignore that for purpose of restitution. So maybe I'm  
13 misunderstanding what you're suggesting or maybe I don't  
14 understand the law. But I don't understand the law to be that  
15 you ignore whatever may be the present value of whatever  
16 interests remain in the most simple case. This is obviously  
17 -- if you add the securities case or so much money is taken,  
18 but a certain amount is left in stocks or whatever it might  
19 be. You have to subtract that out, right?

20 MS. KOMATIREDDY: Right. I understand the concern,  
21 Your Honor, and there are going to be -- the simple case in  
22 this instance will be some of the victims were reimbursed for  
23 example by another trust bank. And we'll subtract that out.  
24 But with respect to the property monies that went to Mexico,  
25 some of those --

1           THE COURT: I should just assume that's zero or --  
2 and then you said something about forfeiture which is  
3 inconsistent with my -- I thought the Government always tries  
4 to keep the forfeiture separate from the restitution issue. I  
5 thought you said at the end that the money from the forfeiture  
6 will be applied to -- that I will order that the money from  
7 the forfeiture be applied to the restitution or maybe I  
8 misunderstood that.

9           MS. KOMATIREDDY: I'm sorry I was unclear. The  
10 issue with respect to the Court's order, yes, the forfeiture  
11 and the restitution orders separately. In practice, what ends  
12 up happening is when money comes in, it is first used to make  
13 the victims whole and then forfeited -- and the excess  
14 forfeited by the Government.

15          THE COURT: Okay. But again, that's good to hear,  
16 but I don't know that that then would affect the amount that I  
17 set for purposes of restitution.

18          MS. KOMATIREDDY: I understand what the Court's  
19 concerns are. We're happy to address that in our sentencing  
20 submissions. I think we can parse this out in a way that it  
21 will be feasible.

22          THE COURT: Okay. Yeah, I think you should -- and  
23 obviously the defendants can as well to the extent you have a  
24 position on what the amount of the restitution should be. And  
25 I understand. I'm not suggesting the whole restitution issue

1 is in that category, but the more I thought about the  
2 forfeiture issue with regard to the money that's in Mexico, I  
3 started thinking about how I'm going to be able to resolve  
4 that, you know, for purposes -- you know, Mr. Kenner has made  
5 a lot of requests to me about the value of that property and,  
6 you know, again, I don't think it matters for purposes of the  
7 sentencing in terms of what my sentence is going to be. But  
8 it could potentially be relevant on the restitution issue.

9 MS. KOMATIREDDY: I understand, Your Honor.

10 THE COURT: Okay.

11 MS. KOMATIREDDY: We do have one more concern with  
12 respect to the sentencing, and we appreciate the Court has  
13 already moved those to a conclusion in September. We do  
14 expect the presence of multiple victims that were affected in  
15 this case at trial and at sentencing, and we expect that they  
16 will be flying in from great distance. I know in the past in  
17 this case it's not uncommon for an adjournment to be requested  
18 close to the deadline for a submission. So all we ask is if  
19 defense counsel or the defendant pro se is going to request  
20 any sort of adjournment that it be done sufficiently in  
21 advance that we can avoid having an issue with respect to  
22 people flying in for the sentencing. So we would ask that the  
23 Court direct --

24 THE COURT: I'm actually thinking maybe we should  
25 have a status conference in early September -- Mr.

1 Constantine, you can appear by phone for that -- and we'll  
2 just see. We'll make sure -- you know, all these issues. We  
3 have a lot of moving pieces. We'll make sure that we're  
4 staying on track.

5 I mean I did -- I saw how many objections there were  
6 any how many guidelines issue there are. I did think about  
7 maybe bifurcating the sentencing and doing those issues on one  
8 day and then having the actual sentencing like the following  
9 day. So if I decide to do it that way, I'd like to avoid  
10 that. But my thinking was we could probably get it all done  
11 in one day, but given what you said, maybe I'll structure it  
12 in a way to make sure that whoever's flying in will not have  
13 to, you know, sit through an elaborate discussion of all the  
14 guidelines issues, okay?

15 MS. KOMATIREDDY: Thank you, Your Honor.

16 THE COURT: All right. So why don't we set a date  
17 in early September for a status conference. But, obviously, I  
18 want to make sure that I'm clear on this forfeiture issue, I  
19 don't necessarily need to wait until September to the extent  
20 that there's no traction on getting a resolution of this. I'm  
21 around the whole summer, all right. So how about like  
22 September 5th?

23 MR. TALKIN: In the afternoon is fine.

24 THE COURT: Afternoon; is that okay with the  
25 Government?

1 MR. HAGANS: Yes, Your Honor.

2 THE COURT: Say 1:30?

3 MR. TALKIN: Perfect.

4 THE COURT: All right. Are there any other issues  
5 from the Government for today

6 [Pause in proceedings.]

7 MS. KOMATIREDDY: No, Your Honor. Nothing from the  
8 Government.

9 MR. TALKIN: Two brief issues, one I think you just  
10 answered it. So, in our sentencing memorandum on the  
11 guidelines issue, it's my take that you want us to succinctly  
12 crystalize the few disputed areas and that's appropriate to be  
13 in the sentencing memorandum as opposed to --

14 THE COURT: Yeah.

15 MR. TALKIN: -- the objections that have already  
16 been made?

17 THE COURT: Yeah. You don't have to repeat all the  
18 objections already admitted. I have those submissions. If  
19 you want to, as you point, crystalize them or repeat a few of  
20 them or -- you can put those in as well, but you don't have to  
21 repeat. I have all those submissions and I'm going to be  
22 looking, you know, at all of the submissions, not just this  
23 last one, okay.

24 MR. TALKIN: And, secondly, there's a small bail  
25 issue to deal with. There was a sureter by the name of Sue



1 Ellen Ferguson who unfortunately passed away. Before that  
2 happened, we -- the property that she posted, the equity of  
3 that ended up in my escrow account and is still there. I've  
4 been contacted and so has the Government and Mr. Hagans has  
5 been working with me on this, there are some issues about that  
6 money because it's now no longer Ms. Ferguson's.

7           The good news is that some 360,000 of the 530- that  
8 are in the account went to Kiki Constantine who's also a  
9 sureter. So I think that's easily resolved. She understands  
10 that that's no longer a liability of Ms. Ferguson, but that's  
11 still posted as bail for Tommy Constantine's behalf, but it's  
12 now her responsibility. So that's easy.

13           There's another \$170,000 that was passed to Mr.  
14 Constantine's children in a trust. I haven't released that,  
15 nor would I. What has happened though, fortunately, is that  
16 Kiki Constantine, the mother's home that she's posted, since  
17 she posted it has gone up in value much more than that  
18 \$170,000. So I think one way to resolve it is it's actually  
19 resolved because you have that surety there.

20           I don't think from my communications with the bank,  
21 with the attorney dealing with the trust and the will in  
22 Arizona, I don't think they're asking for that 170- to come  
23 out. I'm certain that they're not. But I just want to flag  
24 that for the judge because there is that issue there that this  
25 doesn't belong to the same sureter, but I believe that we

1 still have the coverage that the Court has required of that  
2 \$170,000. So I don't think it's an issue, and I can tell you  
3 that 170- isn't going anywhere, but I just -- you can see --

4 THE COURT: Okay.

5 MR. TALKIN: -- the obvious issue that we can see --

6 THE COURT: Yeah. No, I'm --

7 MR. TALKIN: -- worse case scenario arising.

8 THE COURT: Okay. If the worst case scenario, you  
9 can have obviously raise it with me at that point given what  
10 you've said about the other property. But I don't think we  
11 need to worry about that today.

12 MR. TALKIN: And then, finally, I will put in  
13 writing that Sue Ferguson -- basically what I just told Your  
14 Honor, I'll put in writing so that we can release Sue Ferguson  
15 legally so that they can move on in Arizona with whatever  
16 other issues they have.

17 THE COURT: Okay. Thank you.

18 MR. TALKIN: Thank you, Judge.

19 THE COURT: All right.

20 MR. HAGANS: I'm sorry, Your Honor, if I can just  
21 add based on my understanding what the discussions with the  
22 estate attorney in Arizona, it's the Government's  
23 understanding that unless something changes, Mr. Constantine  
24 is set up to become the trustee of those trusts to which  
25 counsel referred which are in the names of I believe his minor

1 children.

2           It's been a while since I looked at the documents,  
3 but it's a total of approximately \$1.5 million across the I  
4 believe it's three. I believe that includes or is expected to  
5 include the funds that are in that escrow account. Seeing as  
6 how nothing has as of now technically changed, that estate or  
7 probate order has not been issued by the Arizona court. The  
8 Government has not had an application on this subject, but  
9 suffice it to say the defendant having access even as a  
10 trustee to that sum of money gives the Government great  
11 concerns.

12           I've expressed those concerns with defense counsel,  
13 and I believe he's agreed to try and work around it so that  
14 the defendant is not a trustee of those assets. But given  
15 that the issue was raised, I wanted to express the  
16 Government's concerns to the Court.

17           THE COURT: All right. So I don't know if you want  
18 to respond to that.

19           MR. TALKIN: Your Honor, yeah. I mean he's right.  
20 We've discussed it. I mean, obviously, look, if he's a  
21 trustee to that amount of money, there are obvious concerns  
22 that would be raised with any defendant, but particularly to  
23 Mr. Constantine, I think he's demonstrated that those concerns  
24 are unfounded.

25           I've spoken to the attorney who told me basically

1 the way it breaks down is if he were to resign as the trustee,  
2 his wife would become next. And then the next individual is  
3 one of the sureters, an individual Mr. Curry, but he has a  
4 fiduciary duty to the trust because he's managing the money.  
5 So he wouldn't be able to take it over. And then finally,  
6 there would be I think the [indiscernible] is a corporate  
7 trustee, and that's where the issue lies. So --

8 THE COURT: Okay.

9 MR. TALKIN: -- certainly there's no problem making  
10 his wife the trustee, but falling further than that, there's  
11 some issues. Now we haven't gotten there yet, but --

12 THE COURT: Well, let's see where -- I mean it's in  
13 the probate court right now, right, so --

14 MR. HAGANS: Correct, Your Honor.

15 THE COURT: -- obviously, you know, when this  
16 crystalizes, if you can't work it out, you can bring it to me.  
17 But --

18 MR. TALKIN: Okay.

19 THE COURT: All right.

20 MR. TALKIN: Thank you.

21 MR. HAGANS: Thank you, Judge.

22 THE COURT: I understand obviously the concern.

23 Okay. Mr. Kenner?

24 DEFENDANT KENNER: Yes, Your Honor. I was just  
25 going to clarify that because of my hearing, that Mr. Talkin

1 was going to arrange for the forensic accountant; is that  
2 correct?

3 THE COURT: Yes. He's going to submit an order to  
4 me so that he can visit you, okay, Mr. Talkin?

5 DEFENDANT KENNER: Okay.

6 MR. TALKIN: That's right, Judge.

7 THE COURT: And then I will issue an order so that  
8 you'll get a copy in the jail once we figure out -- we have to  
9 call some attorneys who are on our list of CJA lawyers to see  
10 who's available to fulfill this role. And we'll issue an  
11 order so you know the person's name, okay?

12 DEFENDANT KENNER: That's fine. And the forensic  
13 accountant was also included in what Mr. Talkin was going to  
14 make an arrangement for?

15 THE COURT: I thought that's what we were just  
16 talking about was the --

17 DEFENDANT KENNER: Okay, not the standby counsel for  
18 --

19 THE COURT: No. We're -- I'm talking about -- he  
20 was talking about the forensic account. He's going to submit  
21 an order so the forensic accountant can come visit you, and  
22 I'm going to issue an order that just indicates who your  
23 standby counsel is, okay?

24 DEFENDANT KENNER: Thank you, Your Honor. And I'll  
25 address those -- the calculations of restitution, et cetera,

1 as you discussed earlier.

2 THE COURT: All right. Thank you very much. Have a  
3 good day.

4 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

5 MR. HAGANS: Thank you, Judge.

6 MS. KOMATIREDDY: Thank you, Judge.

7 (Proceedings concluded at 2:22 p.m.)

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

A handwritten signature in black ink, appearing to read 'Shari Riemer', is positioned above a horizontal line.

6 Shari Riemer, CET-805

7 Dated: July 15, 2019

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